No. 85-2099

IN THE

Supreme Court of the United States

OCTOBER TERM, 1986

COMMONWEALTH OF PENNSYLVANIA,

Petitioner,

—v.—

DOROTHY FINLEY,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPERIOR COURT OF PENNSYLVANIA

BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE CIVIL LIBERTIES UNION OF PENNSYLVANIA, *AMICI CURIAE* IN SUPPORT OF THE RESPONDENT

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, MA 02215
(617) 353-2826

STEFAN PRESSER
American Civil Liberties
Union of Pennsylvania
Bourse Bldg., Suite 680
Independence Mall
Philadelphia, PA 19106
(215) 592-1513

ALVIN J. BRONSTEIN
VIVIAN O. BERGER
DAVID GOLDSTEIN
American Civil Liberties
Union
132 West 43rd Street
New York, NY 10036
(212) 944-9800

QUESTIONS PRESENTED

I.

Whether the writ of certiorari granted in this case should be dismissed because the judgment below rests upon an adequate and independent state law ground.

II.

Whether in a case such as this, in which a state undertakes to appoint counsel to represent an indigent applicant for state postconviction relief, the due process clause of the fourteenth amendment requires the state to supply counsel who performs as an advocate.

INTEREST OF AMICI CURIAE

The American Civil Liberties Union is a nationwide, nonpartisan organization of more than 250,000 persons, dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Pennsylvania is one of its state affiliates.

The ACLU and its affiliates have long worked to protect the rights of criminal defendants and have filed many briefs, as counsel for a litigant or as amicus curiae, in criminal cases requiring the interpretation of federal constitutional provisions.

With the consent of the parties, indicated by letters lodged with the Clerk of this Court, we file this brief amici curiae in support of the respondent.

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STATEMENT OF THE CASE

The procedural history of this case is described in the superior court's opinion below. Dorothy Finley was convicted after a bench trial. The Pennsylvania Supreme Court found her claims on appeal (that some evidence admitted against her had been seized illegally and that the prosecution's evidence was insufficient for conviction) to be without merit. Later, Finley raised the same claims in a pro se application for collateral relief pursuant to the Pennsylvania Postconviction Hearing Act. The trial court denied relief summarily, but the state supreme court remanded on the ground that Finley, if indigent, had been denied her state law right to the appointment of counsel to assist her in the pursuit of postconviction relief in state court. J.A. at 7-8.

The state supreme court instructed the trial court to investigate Finley's financial status and, if she was found to qualify for assigned counsel, to appoint an attorney to represent her. The court was clear that appointed counsel would not be limited to the claims that Finley herself had raised, but would "explore legal grounds," "investigate underlying facts," and "articulate claims." Performance of that kind, the court said, would "promote efficient administration of justice" in Pennsylvania. The court stated expressly that, if counsel were appointed, the prisoner would be permitted to amend her pro se petition. J.A. at 8.

The trial court appointed an attorney, Michael A. Seidman, who met with Finley and read the "Notes of Testimony" at trial, consisting of the trial transcript. Seidman concluded that he could find no

issues of "arguable merit" to raise on Finley's behalf. He then sought advice from the trial court, which suggested that Seidman write a letter to the court describing his work and explaining why his client's claims were meritless. Then, the trial court itself would conduct "its own independent review" and, if the court agreed with Seidman, the court would dismiss Finley's petition without a hearing. Seidman wrote such a letter, the trial court dismissed Finley's petition without a hearing, and new counsel was appointed for an appeal. That appeal produced the superior court judgment under review here.

The superior court held that the trial court's indulgence of Seidman's superficial performance denied Finley the "meaningful" participation of counsel to which she was

entitled. The court explained that indigent applicants for postconviction relief in Pennsylvania have a right to appointed counsel who act as advocates, not to tell the state courts why claims are not meritorious. In this case, Seidman had a duty to explore possible claims apart from those already considered on appeal and to pursue any arguable issues in a professional manner. If no such claims existed, the superior court acknowledged that Seidman might ask to be relieved, but in that instance he would have a duty to inform Finley of his views in order to permit her to proceed on her own.

Seidman's performance failed on both counts. He did not look outside the record. Indeed, he did not explore even the record thoroughly and thus overlooked several issues that Finley's new attorney,

Catherine M. Harper, uncovered when she was assigned to this case after Seidman was allowed to withdraw. Moreover, Seidman did not notify his client of his views regarding her claims in order to permit her to proceed on her own behalf. As a result, she suffered summary dismissal. Accordingly, the superior court held that the procedure adopted by the trial court to accommodate Seidman deprived Finley of her right to adequate representation and remanded with instructions to hold an evidentiary hearing on the claims that Harper identified.

SUMMARY OF ARGUMENT

The superior court judgment under review in this case represents a genuine effort on the part of the Pennsylvania appellate courts to orchestrate the adjudication of federal constitutional claims within the state court system. Most federal claims, to be sure, are identified and determined at trial and on direct review. Others escape early detection and can only be treated in collateral proceedings.

To ensure that such claims are identified and adjudicated fully and fairly, Pennsylvania has established a postconviction motion procedure for use by state prisoners and has guaranteed the appointment of counsel to represent those unable to hire lawyers of their choice. The appointment of counsel is not merely a

matter of form; lawyers are provided to indigent prisoners to ensure that arguable claims are identified, developed, and put to the state courts in a professional manner. It follows that counsel appointed under these circumstances must be held to a reasonable standard of performance. The Pennsylvania appellate courts have long held that not only sound state policy, but the fourteenth amendment furnishes minimal standards that counsel must meet. Thus, in reviewing the trial court's accommodation of Mr. Seidman in this case, the superior court referred to this Court's decision in Anders v. California, 386 U.S. 738 (1967), in which the due process clause was interpreted in analogous circumstances.

If the superior court's judgment is to be reversed, it can only be because Pennsylvania's assimilation of Anders into

its postconviction remedial scheme has so skewed the meaning of due process in this context that this Court must disturb a state appellate court's decision to order a state trial court to hold an evidentiary hearing to consider arguable federal claims for collateral relief. Nothing in this case warrants such extraordinary action. On the contrary, when the salient features of the superior court's analysis are examined, the validity of that court's judgment can readily be seen.

On the understanding that the Court prefers that jurisdictional issues be treated in advance of arguments on the merits, we explain at the outset that the writ of certiorari was granted improvidently in this case and should be dismissed--because the judgment below rests upon an adequate and independent state law

ground. Next, turning to the merits, we make an argument in three parts.

First, we explain that the fourteenth amendment is implicated by appointed counsel's poor performance, whether or not the Constitution required the assignment of counsel in the first instance. The superficial contention that federal performance standards are unavailable merely because counsel was appointed pursuant to state law amounts to the unexamined assumption that the "greater" power to refuse counsel to an indigent includes the "lesser" power to promise an advocate, yet to deliver an adversary. That line of argument misconceives the nature of the state's assumed "powers" and constitutes, in effect, an attempt to revive the "right-privilege" distinction long since laid to rest. Nothing in this

Court's decision in Wainwright v. Torna, 455 U.S. 586 (1982), supports any such thesis.

Second, we explain that the state appellate courts in Pennsylvania have quite properly required appointed counsel in postconviction proceedings to perform as advocates. In this context, counsel has a duty to investigate arguable claims not treated at trial or on appeal, to explore them, and to present them in the manner most advantageous to the client. The state courts reasonably looked to analogous precedents like Anders in determining and applying appropriate performance standards for counsel in state collateral proceedings. To describe the question of Anders' significance in this context as the question whether that decision "applies" to state postconviction proceedings is to

misconceive the way in which Anders was invoked below.

Third, we put this case in institutional perspective and appraise its implications for the distribution of decision-making responsibility between the state courts on the one hand and the federal habeas corpus courts on the other. We engage the misguided thesis that deference to the Pennsylvania courts in this instance would create incentives for frivolous litigation in the federal forum and explain, by contrast, that an affirmance of the judgment below would foster full and fair state court adjudication of federal claims, thereby avoiding, in many instances, the need for subsequent federal litigation.

ARGUMENT

I.

THE WRIT OF CERTIORARI GRANTED IN THIS CASE SHOULD BE DISMISSED BECAUSE THE JUDGMENT BELOW RESTS UPON AN ADEQUATE AND INDEPENDENT STATE GROUND

We understand that the Court prefers that jurisdictional issues be treated prior to arguments on the merits. Accordingly, we begin with the question whether the writ in this case should be dismissed as improvidently granted. We think it should be--because the judgment below rests upon an adequate and independent state law ground of decision. Murdock v. City of Memphis, 87 U.S. 590 (1874). As required by this Court's decision in Michigan v. Long, 463 U.S. 1032 (1983), the superior court explicitly denominated the state law ground of its decision and explained the place of federal precedents, like Anders v.

California, supra, in plain language:

> Pennsylvania law concerning procedures to be followed when a court-appointed attorney sees no basis for an appeal is derived from the seminal case of Anders....J.A. at 21 (emphasis supplied).

To acknowledge that state law was "derived from" one of this Court's precedents is merely to describe an historical evolution; it is hardly to translate what is a matter of state law into something federal.

On the particular question of the role of counsel in postconviction proceedings, moreover, the superior court relied flatly on the relevant Pennsylvania rule:

> Pa. R. Crim. P. 1504, in affording counsel, means that counsel should act as an advocate in fulfilling his role. J.A. at 24 (emphasis supplied).

The rules under which counsel is provided to indigents in Pennsylvania postconviction proceedings were promulgated well after Anders was decided. If Pennsylvania chooses as a matter of state

policy to establish a right to counsel for indigents in postconviction proceedings and a concomitant right to the services of a genuine advocate, the essential character of that policy as one of state law is hardly altered by the mere existence of an earlier decision from this Court in an analogous field--even if Pennsylvania may have been influenced by that decision, even if, indeed, the Pennsylvania rules and subsequent case law amount to an incorporation of the federal decision into state law. State law is not federal because it was fashioned, like all state law, against the general backdrop of this Court's interpretations of the Constitution.

Notwithstanding the superior court's clear language, the state's attorney insists that the basis of the judgment below was federal. Indeed, as the state's

attorney portrays the matter, the superior court took the action it did only because it believed that a remand was "constitutionally required" in light of the Anders case, a precedent from this Court sufficiently in point to control the disposition here. Brief for Petitioner at 11-12.

The state's attorney fundamentally misconceives the way in which the Anders decision was implicated below.[1] First, the superior court did not grudgingly acquiesce in a constitutional decision from this Court that seemed to make unreasonable, but nonetheless unavoidable, demands upon assigned counsel in

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1 The superior court's opinion does include the statement that the "application" of Anders to this case is "proper." J.A. at 24. That statement must be taken in context, however; we characterize that context in the text next following.

postconviction proceedings. Rather, the superior court affirmatively stated, explored, and decided the substantive question at bar: whether the trial court's behavior comported with state law. Nothing in the opinion under review here remotely supports the thesis that Pennsylvania feels compelled to tolerate Anders in this context against the better judgment of state authorities, or that Pennsylvania yearns for the "freedom" to embrace the procedure followed by the trial court in this case. The judgment below rests on a considered evaluation of competing substantive concerns, not an arid citation of federal precedent.

Second, the superior court did not rest on Anders, even as an analogous precedent, in isolation from other cases in point, but rather as a part of a larger, richer body

of settled understandings in Pennsylvania about the proper role of counsel in postconviction proceedings. The state's attorney fails to comprehend the manner in which Anders has been assimilated into the relevant line of Pennsylvania cases and, into the bargain, the extent to which the expectations of counsel articulated in Anders have matured into the mandate of state law.

A review of Pennsylvania state decisions in point, handed down before and after Anders, reveals beyond question the state law basis for the body of law on which the superior court rested its judgment in this case. When the Pennsylvania Supreme Court first took account of Anders in Commonwealth v. Baker, 429 Pa. 209, 239 A.2d 201 (1968), the court was quick to point out that earlier

Pennsylvania decisions, notably Commonwealth ex rel. Cunningham v. Maroney, 421 Pa. 157, 218 A.2d 811 (1966), had already held, as a matter of state law, that appointed counsel must perform as an effective advocate.

The Pennsylvania courts, moreover, have often referred to Anders in circumstances quite apart from the appellate context in which that case was decided. E.g., Commonwealth v. Thomas, 511 A.2d 200 (Pa. Super. 1986) (demanding effective advocacy from counsel appointed in parole revocation proceedings). No one would seriously contend that the state courts felt themselves controlled in such cases by the mere existence of a plainly distinguishable federal precedent. On the contrary, Pennsylvania standards for counsel's behavior are clearly grounded in state law

which, as the state courts' citation to Anders makes plain, is thought in Pennsylvania to be consistent with federal standards in analogous circumstances.

This is nowhere more clear than in Pennsylvania's cases regarding appointed counsel in postconviction proceedings. Those decisions are replete with explicit statements of controlling state law. E.g., Commonwealth v. Fiero, 462 Pa. 409, 341 A.2d 448, 450 (1975) (holding that "the mandate of section 12 of the Post-Conviction Hearing Act" had not been met); Commonwealth v. Green, 513 A.2d 1008, 1013-14 n. 7 (Pa. Super. 1986) (relying on "the assistance of counsel which Pennsylvania law requires"). Indeed, in the leading case, Commonwealth v. Mitchell, 427 Pa. 395, 235 A.2d 148 (1967), the Pennsylvania Supreme Court explained the

state law requirement that effective counsel be appointed in state postconviction proceedings by reference to the American Bar Association's suggested standards.

Thus it is inaccurate to speak of Anders as an extraneous, coercive order trom this Court to handle some matters in a particular way--an order that must be respected and to which the state's own preferences must be subordinated. On the contrary, Anders forms a part of Pennsylvania's general approach to postconviction remedies. Any attempt now to pluck Anders out of its place in Pennsylvania postconviction law would not free that state to choose its own course, out would frustrate the policies the state has already chosen.

It is, then, too late in the day to propose, as does the state's attorney here,

that the elaborate Pennsylvania system of providing effective counsel to indigents in postconviction proceedings is only a lock-step adherence to federal precedent. The judgment below rests on state law grounds, reflected in a range of state law authorities. Accordingly, the writ of certiorari was improvidently granted in this case and should be dismissed.

II.

APPOINTED COUNSEL'S INCOMPETENT PERFORMANCE IMPLICATES THE FOURTEENTH AMENDMENT WHETHER OR NOT THE FEDERAL CONSTITUTION REQUIRED THE ASSIGNMENT OF COUNSEL IN THE FIRST INSTANCE

A. A state has no "greater" power to deny appointed counsel in the first instance that includes a "lesser" power to provide an attorney who performs incompetently

It is a commonplace that a state's unilateral decision to extend benefits to its citizens in the absence of a federal constitutional obligation to do so can nonetheless trigger constitutional standards under which the state's policies must be carried out. Indeed, inasmuch as the Constitution imposes comparatively few affirmative obligations on the states, instances in which federal standards come into play to ensure fairness and

rationality at the implementation stage are routine rather than exceptional. This is the message of this Court's numerous procedural due process decisions.

Here, Pennsylvania chose to establish a postconviction remedy for use by prisoners and chose as well to make counsel available to indigents like Finley.[2] In this, the

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[2] There is no occasion in this case to decide whether the states must provide state postconviction remedies for federal claims, cf., Case v. Nebraska, 381 U.S. 336 (1965) (pretermitting the issue), or whether indigent applicants for state postconviction relief are uniformly entitled to assigned counsel. Cf., Douglas v. California, 372 U.S. 353 (1963) (holding that counsel must be appointed on first appeal as of right). It is important to note with respect to the latter question, however, that in Pennsylvania a prisoner's access to postconviction proceedings is not discretionary, but a matter of right. The state postconviction courts, then, have plenary power to correct errors of fact or law made in the course of trial or appellate review. This is in marked contrast to the function of discretionary appellate review with which this Court was concerned in Ross v. Moffitt, 417 U.S. 600 (1974).

state plainly meant not only to treat indigent prisoners fairly, but also to ensure that state collateral process would be employed effectively--the better to further the state's objective that federal claims be fully and fairly adjudicated within the state court system. Thus the state supreme court said explicitly that counsel's participation would "promote efficient administration of justice" in Pennsylvania. J.A. at 8. Cf. Sumner v. Mata, 449 U.S. 539 (1981) (relying on state courts for this purpose). Having created such an opportunity to litigate and having held out the promise of professional representation to prisoners too poor to hire their own lawyers, the state was constitutionally responsible to keep the doors of its postconviction courts free of arbitrary obstacles and to provide genuine

advocates to those prisoners to whom the state promised assigned counsel.

In the case at bar, of course, Pennsylvania has attempted to do just that. When the trial court originally failed to appoint an attorney on Finley's behalf, the Pennsylvania Supreme Court remanded with instructions to assign a lawyer to represent her. And when the trial court permitted Mr. Seidman to forego performance as a genuine advocate and, instead, to file a "no merit" letter, the superior court remanded yet again. A state cannot hold out to impoverished inmates the promise of an attorney sworn to represent them with zeal and then renege--by, in fact, providing a lawyer who, while allowing his client to rely on his services to her detriment, actually advises the court that her claims are not worth

pursuing and then stands idly by as her action is summarily dismissed. That is the practice in which the trial court engaged. The superior court rejected such a procedure, as well it might; yet the state's attorney now asks this Court to approve it.

The state's attorney's primary argument amounts to a superficial invocation of a beguiling syllogism this Court has seen and rejected before: the greater power necessarily includes the lesser. E.g., Evitts v. Lucey, 469 U.S. 387, 105 S. Ct. 830 (1985). The state's attorney assumes that Pennsylvania might have refused to appoint an attorney to represent Finley in state postconviction proceedings. Accordingly, the state's attorney argues that the state (in the form of the trial court) was free to deliver whatever brand

of legal "services" the trial court saw fit to provide. The flaws in this analysis are easy enough to identify.

First, the state's attorney misconceives the nature of the state "powers" on which this argument depends and the relationship, if any, between them. The notion that the state's assumed ability to refuse indigent prisoners the assistance of counsel is a "greater" power, inclusive of a "lesser" power to deliver faulty legal services, is plainly in error. A state's assumed capacity to avoid difficulties simply by failing to take action is far from the "greater" authority the state's attorney suggests. A price would be exacted if the state were to deny counsel to indigents like Finley; the state would necessarily sacrifice its own interests in the thorough adjudication of federal claims

in state court. It is equally erroneous to propose that the assumed authority to provide only shoddy legal services is in any sense a "lesser" power in any event. Failing to deliver on a commitment to appoint an advocate to represent an indigent is no more a subset of refusing to provide counsel at all than malfeasance is a subset of nonfeasance.

Second, the state's attorney's argument constitutes, in effect, a belated attempt to resurrect the long-rejected "right-privilege" distinction in constitutional law. The notion that, having chosen to protect its own as well as prisoners' interests by promising the appointment of counsel in postconviction proceedings, a state is free to breach that promise at will ignores, once again, the well-settled understanding that the

Constitution fixes minimal standards governing the way in which the states pursue their self-chosen policies. Arbitrariness and unfairness are plainly forbidden whenever the state acts with respect to individual liberty.

Third, the state's attorney's argument offers to prove altogether too much. If the state's ability to withhold counsel in the first instance were sufficient justification for any flaw in the performance of assigned counsel, it would follow that the trial court might have allowed Mr. Seidman to accept an appointment, to do nothing with respect to the case, and thus to leave his client waiting in her cell for word that would never come. No one would seriously contend that the Constitution would permit the trial court so to mistreat a litigant, much

less on the theory that Pennsylvania might have declined to appoint counsel initially.[3]

B. This case does not implicate the rationale of Wainwright v. Torna

Nothing in Wainwright v. Torna, supra, supports the state's attorney's remarkable assertion that if a state need not promise at all, it can make and break promises without constitutional fetter. The prisoner in Torna sought discretionary review on certiorari in the Florida Supreme Court. That court was not a court of error for ordinary criminal cases; certiorari review was reserved, under state law, for cases presenting questions of general or

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3 The state's attorney raises another version of this argument in connection with an attempt to distinguish Anders, supra, from the case at bar. We treat that argument infra, at 40-45.

institutional significance. In circumstances of that kind, this Court had held a decade earlier that counsel need not be appointed for indigents. Ross v. Moffitt, supra. The per curiam in Torna concluded, accordingly, that the failure of a prisoner's retained counsel to file a timely petition did not constitute ineffective assistance of counsel in violation of the fourteenth amendment.

In this case, by contrast, Finley sought not discretionary review before a court charged to treat only questions of widespread interest, but effective access to a state postconviction court--made available routinely for the correction of constitutional errors at trial or on appeal. The Constitution may permit the states to establish a form of appellate jurisdiction after the fashion of this

Court's own certiorari practice, to reserve such an appellate process for special cases, and, in so doing, to overlook the defaults of counsel retained by prisoners hoping that their cases will be chosen for review. When, however, a state opens an avenue of attack to accommodate routine cases for the correction of errors, a prisoner's claim to effective representation is greatly enhanced. In Torna itself, this Court left open the question whether the prisoner in that case might have been constitutionally entitled to effective representation if he had sought appellate review to which he was entitled as a matter of state law right. 455 U.S. at 587 n. 3.

More fundamentally, the prisoner in Torna had retained an attorney who, in turn, failed to file a seasonable

application. He thus injected retained counsel into state proceedings in which, by hypothesis, counsel was not essential to ensure fundamental fairness, and then sought to hold the state responsible for that retained lawyer's misconduct. Here, by contrast, Finley did not attempt to manufacture a constitutional claim by introducing her own attorney and then ascribing his misbehavior to the state. She merely accepted the state's promise to provide her with a professional advocate, relied upon that attorney to do his job, and then fairly complained to the state wnen he abandoned her without notice and, in effect, became her adversary by advising the court that her action should be summarily dismissed.

This is the very case Torna was not--a case in which the state (that is, the state

trial court) deprived a litigant of a state law right of access to the state courts. Id. at 588 n. 4. Because Seidman was assigned to represent Finley by the trial court, and because that court then suggested, orchestrated, and rested upon performance by Seidman falling below minimal standards, there was a breach of faith in this case, ascribable to the trial court, that did not exist in Torna. That breach of faith furnishes the federal constitutional claim identified by the superior court below.[4]

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[4] In drawing this distinction between Torna and the case at bar, we do not partake of the now-discarded contention that the standards of performance are different for assigned and retained counsel. See Cuyler v. Sullivan, 446 U.S. 335 (1980). Nor do we neglect this Court's decision, in a dramatically different context, that assigned attorneys assisting indigent litigants do not ordinarily act "under color of state law." Polk County v. Dodson, 454 U.S. 312 (1981).

III.

COUNSEL APPOINTED TO REPRESENT AN INDIGENT IN STATE POSTCONVICTION PROCEEDINGS MUST PERFORM AS AN ADVOCATE

A. The essence of counsel's role is advocacy

Once it is established that a state's practice of leading indigent applicants for postconviction relief to rely on appointed counsel is subject to constitutional requirements, the next question is the appropriate measure of counsel's responsibilities. At a minimum, due process requires that counsel must perform as an advocate. At its core, the American justice system is, after all, adversarial in nature. Americans, therefore, reasonably and rightly understand that the function of lawyering is advocacy. See Commonwealth v. Fiero, supra. When, accordingly, a lawyer is promised, the

lawyer that is expected is an advocate who takes the client's part with zeal. An attorney who advises only the court, rather than the client he is assigned to represent, is at best a mere amicus curiae--playing a role decidedly different from what the client has been led to expect. Indeed, as in this case, such an attorney is effectively his client's adversary.

Time and again, this Court has confirmed that counsel's advocacy role is critical to the maintenance of the adversarial model on which our courts depend. In the sixth amendment context, the Court said in Gideon v. Wainwright, 372 U.S. 335, 344 (1963), that lawyers are "necessities, not luxuries" in this adversarial system of justice; in Herring v. New York, 422 U.S. 853, 862 (1975), the

Court stated that the "very premise of our adversarial system...is that partisan advocacy on both sides of a case will best promote the ultimate objective that the guilty be convicted and innocent go free"; and, more recently in Strickland v. Washington, 466 U.S. 668, 688 (1984), the Court said that counsel owes to the client the duty to be loyal, to "advocate" the client's cause, and to "bring to bear such skill and knowledge as will render the trial a reliable adversarial testing process."

Similarly, in cases in which counsel's performance is measured against the fourteenth amendment of its own force, this Court has placed great emphasis upon the advocacy function. Only last Term, in Evitts v. Lucey, supra, at 835, the Court explained that counsel "must play the role

of an active advocate, rather than a mere friend of the court assisting in a detached evaluation" of clients' claims.

The concrete form that counsel's advocacy must take depends, of course, on the context in which professional services are needed. At trial, counsel attempts to persuade the trier of fact of the defendant's innocence; on direct review, counsel attempts to develop claims of arguable error identifiable in the record. At the collateral stage, counsel does what the Pennsylvania Supreme Court expressly described in this case. It is insufficient if counsel merely satisfies himself that the client is factually guilty or that claims arising from the record are nonmeritorious. Counsel has an obligation to investigate other arguable claims, to

explore them, and to present them in the most advantageous way from the client's point of view.

This is not to suggest that counsel must begin entirely afresh. The client may suggest facts that have legal significance, and prior proceedings have typically produced a record that can serve as the primary focus of counsel's examination. Yet counsel surely is obligated to work with the client to uncover information that may be useful and to examine the record thoroughly to detect arguable issues.

Nor is this to suggest that counsel must pursue claims reasonably found to be frivolous. That is not the law in this Court, see Jones v. Barnes, 463 U.S. 745 (1983); nor is it the law in Pennsylvania. Loosely-applied labels can create confusion in this context, and we hardly propose that

this Court should draw hair-fine distinctions between, for example, claims that are "frivolous" and those that are merely "nonmeritorious." The substance of the matter, however, is plain. Amici curiae may well guess at the probability that an arguable claim will be found meritorious and advise the court accordingly; advocates argue those claims and find out whether they will be sustained.

There is no magic formula for distinguishing claims that competent lawyers do and must pursue from those so thoroughly lacking in value that they can be discarded no matter how appealing they may seem to the client. It is quite clear, however, that only disciplined professional advocates who have invested sufficient time and effort in an attempt to uncover claims

to help their clients are in a position to judge the difference.

In the case at bar, the Pennsylvania Supreme Court instructed the trial court to appoint counsel to represent Ms. Finley as an advocate. The lawyer chosen, Mr. Seidman, did not fulfill that role. By his own account, he merely talked with his client and read notes on the testimony at trial. Nothing in his report suggests a careful exchange with Finley, calculated to elicit information pertinent to new collateral claims. Nor was his examination of the trial transcript an adequate substitute for sustained, rigorous investigation of the record in search of arguable claims. Ms. Harper's ability to identify claims of "arguable merit" provides powerful evidence that Seidman's work was superficial at best. Accordingly,

the superior court remanded with instructions to hold an evidentiary hearing on the claims identified by Harper. There is no reason to second-guess that entirely reasonable disposition.

B. Pennsylvania has relied upon Anders v. California only as an analogous precedent

The state's attorney apparently objects to the course of action taken below not because the state courts in Pennsylvania lack authority to order hearings in collateral proceedings when they find it advisable, but because the superior court partially explained its judgment by reference to Anders v. California, supra. Thus the state's attorney puts the question now before the Court as whether Anders "applies" to state postconviction proceedings. The choice at this juncture, according to the state's attorney, is between Anders'"formal requirements" or freedom on the part of Pennsylvania and other states to choose for themselves "what procedures can most meaningfully and fairly enforce state laws...." Brief for Petitioner at 22-23.

This, with deference, is not the choice at all. The truth of the matter is that Anders does not "apply" to this case in the wooden sense that the state's attorney seems to mean. That was a case about what the Constitution has to say about the duties of counsel appointed to pursue a first appeal. There are important similarities between the role of counsel on initial appeal, where the advocate must identify and press arguable claims appearing in the record, and the role of counsel in collateral proceedings, where the advocate must explore other claims. Those similarities more than explain the superior court's reference to Anders. Yet it would be a mistake--a mistake not made below--to propose that appointed counsel's obligations here track neatly counsel's responsibilities there. Thus the Pennsylvania Supreme Court in this case was

at pains to explain the duties of assigned counsel in Pennsylvania postconviction proceedings. See p. 2 supra.

Still, having insisted that the question in this case is whether Anders "extends" to state postconviction proceedings, the state's attorney launches a forthright assault on Anders itself. It is argued, for example, that Anders is "confused," and "unworkable," that counsel is placed in a "dilemma," and that Anders is "schizophrenic." Brief for Petitioner at 12-14. These charges are leveled not to ask that Anders be overruled here and now; such a request would be inappropriate in a case in which Anders is involved only as an analogous precedent. They are raised, instead, in support of the thesis that it would be "impractical, unwise, and constitutionally unnecessary" to require counsel in state postconviction proceedings to do precisely what counsel must do, under

Anders, on direct review. Id. at 12. This, again, is a straw man.

Apart from attacking Anders in its own field, the state's attorney offers one basis for distinguishing that case from this--that Anders was merely an adjunct to Douglas v. California, supra, in which this Court held that counsel must routinely be appointed to represent indigents on first appeal as of right. Again assuming that there is no similarly routine federal right to counsel in state postconviction proceedings, the state's attorney contends that Anders has no postconviction analogue. This argument apparently understands Douglas to have created a free-standing constitutional right to counsel on appeal, which was then embellished by Anders. By this account, Evitts, supra, was also a mere elaboration

of Douglas. Yet Douglas, like Griffin v. Illinois, 351 U.S. 12 (1956) (involving transcripts of trial), was itself in aid of a prior federal right, grounded in due process, to fair access to state appellate process. And, of course, this Court has declined thus far to hold that the states are constitutionally obliged to establish appellate review in criminal cases. See McKane v. Durston, 153 U.S. 684 (1894).

The beginning of wisdom in understanding all these cases, Griffin, Douglas, Evitts, and Anders, is the recognition that they are all unremarkable interpretations of the due process clause in various, similar circumstances.[5] They are not isolated creations by this Court of

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5 Although the equal protection clause figured in the opinions in Griffin, Douglas, and Anders, this Court has more recently placed emphasis on the due process component of those decisions. E.g., Evitts, supra, at 840-41.

independent constitutional rights accompanied by ancillary definitions of the scope of those rights. Douglas did not create an independent right to counsel on appeal any more than Griffin created an independent right to a transcript of trial. Anders did not further define Douglas any more than did Evitts. In each of these instances, the Court merely prescribed the process that was due constitutionally. The same task is before the Court in this case.

IV.

HOLDING APPOINTED COUNSEL TO MINIMAL CONSTITUTIONAL STANDARDS WILL FOSTER FULL AND FAIR ADJUDICATION OF FEDERAL CLAIMS IN STATE COURT AND THUS AVOID LITIGATION OF SUCH CLAIMS IN FEDERAL HABEAS CORPUS

Habeas corpus for state prisoners nas come under criticism in recent years for permitting applicants to press federal claims in the federal forum when, for some reason, those claims were overlooked or rejected in prior state court proceedings. Having noted such criticism, we hasten to point out that it has no place in this case. For in this instance the only federal claim immediately in issue touches not Ms. Finley's conviction, but the adequacy of the state court machinery for treating her federal claims. In order, in part, to make federal habeas litigation unnecessary in the run of cases,

Pennsylvania has established a workable and working scheme to ensure that federal claims will be identified in state court and that they will be fully and fairly adjudicated there--with the vital assistance of assigned advocates for indigents.

If this Court were now to frustrate the state's scheme merely because federal decisions have been woven into state standards over the years, the result would be more federal habeas litigation at the behest of prisoners who, for want of effective representation in state court, suffer dismissal regarding claims that may well be meritorious. If, on the other hand, this Court affirms the judgment below, the courts of Pennsylvania will continue their efforts to resolve federal claims in state court, thus reducing

prisoners' incentives to seek relief elsewhere.

It may be helpful to think of the question at bar within the context of the "process" model of federal-state relations much discussed in the literature. E.g., P. Bator, P. Mishkin, D. Shapiro & H. Wechsler, Hart and Wechsler's The Federal Courts and the Federal System 1467-68 (2d. ed. 1973). Observers who doubt the wisdom of the congressional plan to provide state prisoners with an opportunity to litigate in federal habeas as a routine sequel to state court litigation typically justify their position on the assumption that state courts can be counted upon to determine federal claims correctly. Those same observers suspend that assumption, however, in cases in which state court outcomes are produced by way of flawed procedural

machinery. The appropriate occasion for federal adjudication, on this model, is to ensure the adequacy of state court procedures rather than the accuracy of state court judgments reached through sound process. The application of this "process" model to the case at bar is plain enough. The crux of the problem in this case is not whether the state courts have correctly determined a federal claim for relief, but whether those courts' efforts to shore up their machinery for treating federal claims will be sustained.

Congress has adopted something like the "process" model with respect to fact-finding in state court. See 28 U.S.C. § 2254(d) (establishing a presumption of correctness in favor of primary facts found in state court after a full and fair evidentiary hearing). The framework

envisioned by § 2254(d) would be frustrated if the state court machinery for determining facts were not up to the task and, accordingly, state factual findings were not entitled to respect in the federal forum. Accordingly, it makes all the sense in the world to encourage states like Pennsylvania in their efforts to establish and maintain genuinely solid state court process for the adjudication of factual issues that would otherwise have to be determined in federal habeas.

Moreover, this Court has remarked on the relationship between § 2254(d) and the exhaustion doctrine in federal habeas corpus. E.g., Rose v. Lundy, 455 U.S. 509, 519 (1982). If state court fact-finding machinery is reliable, state litigation of the substantive legal questions to which primary facts relate can build a firm

record and thus render federal adjudication of those substantive claims more efficient--if and when a prisoner seeks habeas relief. Once again, then, the distribution of decision-making authority between the state and federal courts, established by Congress in statutes like § 2254(d) and underscored by this Court's decisions in point, would be furthered by affirming a state's good faith attempts to ensure that its courts play the role assigned to them.

We understand, of course, that an affirmance of the judgment below would recognize that the Constitution has meaning with respect to the performance of assigned counsel in state postconviction proceedings and, therefore, that some disappointed prisoners might raise claims going to the effectiveness of such counsel in later

petitions for federal habeas relief.[6] Yet it would make no sense for this Court to deny that the Constitution requires advocates in this context merely to eliminate potential habeas litigation on such claims. That course would inflate the significance of future habeas litigation touching this particular claim out of all proportion to the far more important gains for the judicial system flowing from the encouragement of thoroughgoing adjudication

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6 Some language in a handful of lower federal court opinions suggests that claims going to prisoners' treatment in state postconviction proceedings are not cognizable in federal habeas corpus because they cannot, even if meritorious, entitle applicants to federal relief from an underlying detention. E.g., Mitchell v. Wyrick, 727 F.2d 773, 774 (8th Cir. 1984). Talk of that kind is misleading. This Court has often addressed claims related only to the administration of state remedial schemes and has approved the award

of federal claims in state court. The fact is that the mere recognition that appointed counsel must behave as advocates would generate relatively few claims of misfeasance, in part because the state courts, too, will police counsel's performance. The present case is itself an illustration.

Some may be tempted to see the problem at bar differently--as the opportunity to seal a rough compromise between prisoners' demonstrable need for professional representation on the one hand and concerns

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of habeas relief conditional upon the willingness and ability of state authorities to cure federal error occurring in state proceedings after sentencing. If, indeed, habeas were unavailable to prisoners complaining of constitutional violations arising from the manner of state court treatment of other federal claims, the Evitts decision would have to be reexamined.

regarding the costs of postconviction litigation on the other. Thus it may be proposed that it is enough that indigent prisoners are entitled to effective counsel on appeal and that a similar entitlement in state collateral proceedings is unjustified by the gains, measured against the costs, of ensuring the availability of advocates at that further stage. The appeal of any such compromise is, at best, only superficial. For it takes as its premise that the Court can read the Constitution out of state postconviction proceedings entirely. That the Court cannot do--without paying a very high price.

There is a sense in which this is the paradigm of a "bad facts" case--the kind of case in which an abstract claim of right is at its weakest. The state's attorney portrays Ms. Finley as the notorious "Black

Dot," who has been accorded the assistance of three different appointed attorneys in state postconviction proceedings (the lawyer who handled the appeal from the dismissal of her initial application for relief, Mr. Seidman, and Ms. Harper) and who insists nonetheless that she is constitutionally entitled to still further assistance from the Commonwealth of Pennsylvania. On close examination, however, the truth becomes clear.

Dorothy Finley stands convicted in Pennsylvania notwithstanding that Pennsylvania's appellate courts have recognized several arguable grounds for asserting that her conviction was obtained in violation of the United States Constitution. Those claims have never been considered in a Pennsylvania court, indeed, in any court. The judgment under review

now is neither more nor less than a state appellate court order that a state trial court take up those claims, consider them fully and fairly with the assistance of a professional advocate on Finley's behalf, and decide them consistent with the state courts' responsibility to enforce federal law.

The sheer number of appointed attorneys in this case is wholly misleading. The three attorneys appointed by the trial court were for the most part introduced only because that court refused to do what state law plainly required. The original attorney was necessary only because the trial court neglected to appoint an attorney to help Finley marshal her claims and file an effective postconviction application. Seidman was properly appointed, but Harper was recruited to

service only because the trial court failed to hold Seidman to the job he was assigned to perform.

This case can be clearly understood only if the Court notes what would have happened if the trial court had followed state law from the outset. The answer to that question is plain enough: The trial court would have appointed an effective advocate to represent Finley at the investigation stage of state postconviction proceedings. It would not have been necessary, then, to appoint an attorney to handle an appeal from the denial of such counsel; nor, certainly, would it have been necessary to appoint an attorney to seek appellate review of another attorney's poor performance. In sum, what happened below happened only because of the trial court's recalcitrance in the teeth of state law. And to this day, three postconviction

attorneys later, Dorothy Finley still has not had a lawyer charged actually to do what the law in Pennsylvania guarantees a lawyer will do on her behalf--investigate, identify, marshal, and pursue arguable claims that were not treated at trial and on direct review. On the contrary, Ms. Finley has suffered yet another summary dismissal because of the trial court's refusal to respect her state law rights.

CONCLUSION

We urge the Court to dismiss the writ of certiorari as improvidently granted. If the Court reaches the merits, we urge the Court to affirm the superior court judgment below.

LARRY W. YACKLE
Counsel of Record
Boston University
School of Law
765 Commonwealth Avenue
Boston, Massachusetts 02215
(617) 353-2826

ALVIN J. BRONSTEIN
VIVIAN O. BERGER
DAVID GOLDSTEIN
American Civil Liberties Union
132 West 43rd Street
New York, New York 10036
(212) 944-9800

STEFAN PRESSER
American Civil Liberties
Union of Pennsylvania
Bourse Bldg., Suite 680
Independence Mall
Philadelphia, PA. 19106
(215) 592-1513